

07-0666
Audit
Signed 08/14/2008

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION Appeal No. 07-0666 Account No. ##### Tax Type: Sales Tax Audit Period: 1/04 – 12/06 Judge: Phan
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Presiding:

Pam Hendrickson, Commission Chair
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, Attorney at Law
PETITIONER REPRESENTATIVE 2
PETITIONER REPRESENTATIVE 3
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Deputy Director, Auditing Division
RESPONDENT REPRESENTATIVE 3, Manager, Sales Tax Auditing
RESPONDENT REPRESENTATIVE 4, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on April 16, 2008, on an appeal filed by Petitioner pursuant to Utah Code Sec. 59-1-501. Petitioner is appealing a sales and use tax audit deficiency. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner is appealing an audit deficiency issued by Respondent (the “Division”) pursuant to a Sales and Use Tax Audit for the period of January 1, 2004 through December 31, 2006. The Statutory Notice

of the Sales and Use Tax Audit, which is the subject of this appeal, was issued by the Division on April 26, 2007.

2. The amount of the sales and use tax deficiency was \$\$\$\$\$ in tax and \$\$\$\$\$ in interest as of the date the notice was issued. Interest continues to accrue on any unpaid balance. No penalties were assessed with the audit. There was no substantial dispute of facts between the parties, the disagreement was in regards to the application of the facts to the applicable law.

3. PETITIONER REPRESENTATIVE 2 was the owner of the business, PETITIONER. He had begun to set up the business in January 2003 and by April 2003 had begun operations. The business was for portable restroom services by providing portable toilets then pumping out the contents and properly disposing thereof. The business did perform other services including removal of waste from septic tanks and providing potable water. Many of Petitioner's customers were governmental entities or nonprofit organizations. For example, Petitioner provided portable restroom services for forest service workers and scout camps or church camps.

4. PETITIONER REPRESENTATIVE 2 indicated that, prior to starting the business, he had been working in construction where he arranged for portable toilet services to the construction sites.

5. Petitioner purchased the portable toilet units from out of state and did not pay sales or use tax at the time of the purchase.

6. While setting up the business, PETITIONER REPRESENTATIVE 2 applied for a sales tax license. However, his accountant had told him that he was providing a service that was not taxable. Petitioner was aware that while he was working in construction and contracting with a company to have the portable toilet services delivered to the construction sites, that company did not charge sales tax. To be certain about the taxability of these transactions, in March 2003, PETITIONER REPRESENTATIVE 2 called the Tax

Commission and spoke with someone named (X). He testified that it was his understanding from that conversation that what he was providing was a service and not taxable. At the hearing he did provide letters from a customer and family members who indicate PETITIONER REPRESENTATIVE 2 had told them about this conversation with the State Tax Commission and that he understood from the conversation that he did not need to collect sales tax.¹ The Division did not produce a (X) or testimony that directly refuted PETITIONER REPRESENTATIVE 2's contention that he had this conversation and he had been told it was a service and not taxable by this Tax Commission employee. The Division did suggest that maybe Petitioner had not told the Tax Commission employee all of the facts.

7. The transactions where Petitioner pumped out a septic tank and disposed of the sewage were not at issue in this matter, as the Division did not assess a sales tax on those transactions. The Division indicated this was a service. Also the Division indicated that it did try to exclude from the audit deficiency invoices that were clearly to a governmental, or otherwise exempt entity. The primary issue at the hearing was the transactions involving portable toilets. The Division considered the transaction to be a lease of tangible personal property and the waste removal and disposal services to be incidental to the lease.

8. Generally, for those transactions that involved portable toilets, Petitioner's employees would deliver the toilets to the customer's specified location and set them up and then leave them there. They may be at a single location for a day or up to many weeks. If they were there for an extended period, Petitioner's employees would drive the pump truck out to the location, remove the sewage with the pump truck and sanitize the portable toilet units. In addition to the time it took the employee to drive the pump truck to the location, the employee would spend about five minutes to pump out the contents of each toilet. The employee would then spend about one additional minute of time on the sanitization of the toilet. PETITIONER REPRESENTATIVE 2 testified that there are regulations on this type of business, so that the customer may

¹Petitioner's Exhibits 1 & 2.

not move or sanitize the toilets, this could only be done by Petitioner. After the sewage was collected from the toilets in Petitioner's pump truck, Petitioner's employee would transport it to a specific waste disposal site, which could take several hours of employee time. When the customer no longer needed the toilet services, Petitioner's employee would remove the portable toilets from the site.

9. PETITIONER REPRESENTATIVE 2 testified that the portable toilets he purchased for the business cost about \$\$\$\$\$ each and had a ten-year life span. The pump trucks, however, cost \$\$\$\$\$ or \$\$\$\$\$ per truck. He estimated that he associated only 2% of his business costs to the portable toilets; the rest was the labor, truck and transportation costs.

10. Petitioner's business was advertised in the (X) and on business cards as "(X)," or "(X)."²

11. Several invoices that had been issued by Petitioner to customers during the audit period were submitted in this matter and invoices appeared to be issued in two different formats. The first group was invoices on which Petitioner broke out the different services by amount of employee time ("Separately Stated Invoices"). Listed on these invoices was a separate delivery charge. There was a separate charge for the pumping out and sterilizing of the units, sometimes referred to as "Service" or "Weekly Service." There was also, separately stated, a charge for the final service and removal of the unit.³ None of these invoices indicated a lease of the portable toilets or an amount charged just for the rental of the toilet units. These invoices appear to clearly identify the charges as being charges for the various services listed.

12. Petitioner did issue a second type of invoice during the audit period based on a request by some customers due to the customers' accounting practice. The second type of invoice indicated a day rate for the portable restroom services ("Day Rate Invoices") rather than hourly rates separately stated for the different

² See Petitioner's Exhibit 3.

³ See Petitioner's Exhibit 6, Invoice Nos. 1663, 1544, 42873, 42627, 42627, 715362.

services performed. It was PETITIONER REPRESENTATIVE 2's testimony that the invoices were prepared in this manner because some customers had asked that the rate for delivery, waste removal, sanitization and then the final removal of the unit could be listed as a per day rate due to the way they needed to account for this cost. Generally these invoices were issued to one customer, COMPANY. These invoices indicated the number of portable toilets, the number of days and the amount charged per day. It was PETITIONER REPRESENTATIVE 2's contention that the day rate was a combined rate for all the services of delivery, set up, pumping out contents, sterilizing and the final removal, divided by the number of days.⁴ Although the invoices did indicate a rate per day for all the portable restroom services provided, the invoices did not state the amount as rent, nor appear to refer to a lease of the portable toilets.

13. It is clear from the testimony and evidence that the major costs of performing the transactions at issue relate to the services provided, and not to the personal property. Respondent did not provide evidence to refute Petitioner's contention that 2% of his costs relate to the portable toilets. In both types of invoices, there is no indication of rent being charged for the use of the portable toilet. The charges are for delivery, removing the contents, sterilization, and removal of the portable toilet. Further, Petitioner had advertised the business as a provider of portable restroom services, not a business that leased out portable toilets. The facts support Petitioner's contention that the primary activity of the business was the removal and disposal of the sewage and the amount charged was primarily for these services. The actual physical portable toilets are clearly essential, but we find they are effectively being used by Petitioner in providing the portable restroom services, rather than being rented as property. Additionally, the small amount of additional time spent in the sterilization is fairly incidental to the removal and disposal of waste.

⁴ Respondent's Exhibit 2, Invoice Nos. 1185, 1197, 1215, 1277, 1286, 1285, CP567, 1627 and 717.

APPLICABLE LAW

1. A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: (h) except as provided in Subsection 59-12-104(7) amounts paid or charged for cleaning or washing of tangible personal property; (k) amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is (i) stored; (ii) used; or (iii) otherwise consumed; . . . (Utah Code Sec. 59-12-103(1).)

2. “Delivery charge” means a charge: (i) by a seller of: (A) tangible personal property; or (B) services; and (ii) for preparation and delivery of the tangible personal property or services described in Subsection (21)(a)(i) to a location designated by the purchaser. (Utah Code Sec. 59-12-102(21)(a).)

CONCLUSIONS OF LAW

1. If separately stated in the invoices, the pumping out and removal of the sewage from the portable toilet on its own, is similar to the pumping out sewage and removal from a septic tank, it is a service that is not taxable. See *Utah State Tax Commission, Advisory Opinion 98-031*. Additionally, as Petitioner had pointed out and Respondent had not refuted, sales tax is not charged on garbage removal services where the garbage disposal company provides a trash container and then removes and disposes of the garbage from the container according to an established schedule.

2. The Commission concludes from the testimony and evidence submitted in this matter that Petitioner is essentially not leasing the portable toilets to its customers, but is instead providing portable restroom services. Therefore, there is no portion of the fees Petitioner charged that would be subject to sales tax as a lease or rental of tangible personal property under 59-12-103(k). The Tax Commission notes there is a distinction in the facts before it in this matter from those in *Tax Commission Order, Appeal No. 94-0609*,⁵

⁵ The Division also cited to *Tax Commission Order, Appeal No. 89-0033*, but the Commission does not find that case to be relevant as the only issue before the Commission was the penalty.

issued on May 25, 1995. From the brief recitation of the facts in that prior appeal, the taxpayer had billed its customers for a “rental” or “rental and service.” Based on the manner in which Petitioner’s transactions were arranged to provide portable restroom services in this appeal, the way the services were advertised and invoiced and the relatively small cost of the portable toilets verses the large labor and equipment costs to provide the sewage removal services, the Commission finds the tangible personal property is incidental to the service. Therefore, the services regarding the portable toilets are not subject to sales tax and the Commission abates this portion of the audit. Of course, if Petitioner changes its business model, the results might be different.

3. In adjusting the audit on this point, as Petitioner is not charging a rental fee subject to sales tax for the portable toilet units, Petitioner is consuming the units in the provision of the services. This means Petitioner should have paid either sales tax, or use tax if purchased from out of state, at the time it purchased the units. Petitioner purchased the units from out of state and did not pay a use tax. The Commission orders Respondent to adjust the audit to add the use tax.

4. Additionally, the Commission would note that with the abatement of the sales tax on the portable restroom services, the Division’s inclusion of the delivery charges are also abated. If the service is not subject to tax then the delivery to provide the services is not taxable.

5. The transactions are not limited solely to the removal and disposal of sewage. On the invoices where the various charges are broken out into an hourly rate, the charge for “Service” or “Weekly Service” is for the removal and disposal of sewage as well as sterilization of the unit. It is clear that the cleaning or sterilization of tangible personal property is normally subject to sales tax pursuant to Utah Code Sec. 59-12-103(1)(h). Even on the Separately Stated Invoices, Petitioner combined its charges for removal and disposal with the cleaning and sterilization. Because we have found that the toilets are being used by Petitioner in the course of providing a nontaxable service, the cleaning and sanitation of its own property is not a retail

transaction. The testimony indicates that applicable government regulations require Petitioner to sanitize its toilets on a regular basis. The fact that Petitioner may seek to recover this cost as a separately stated line item on its invoice, does not convert the cleaning into a taxable service performed for its customers.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission abates the portions of the audit deficiency as indicated above related to the portable toilet services. The Commission orders Respondent to add a use tax to the audit on the purchases of the portable toilets. Interest is to be adjusted accordingly. It is so ordered.

DATED this _____ day of _____, 2008.

Jane Phan
Administrative Law Judge

Appeal No. 07-0666

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2008.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. and 63-46b-13 et seq.

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